



**Mwamba & another v Mutwiri (Suing as the legal representative of the Estate of Mutea Imanyara (Deceased) (Environment & Land Miscellaneous Case E025 of 2023) [2024] KEELC 1600 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1600 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MERU**  
**ENVIRONMENT & LAND MISCELLANEOUS CASE E025 OF 2023**  
**CK NZILI, J**  
**MARCH 13, 2024**

**BETWEEN**

**SILVESTER KINYUA MWAMBA ..... 1<sup>ST</sup> APPLICANT**

**GITONGA KANAMPIU KABERE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**DELFINA KAROKI MUTWIRI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MUTEA IMANYARA (DECEASED)) ..... RESPONDENT**

**RULING**

1. The court is asked to grant a stay of execution pending hearing and determination of the intended appeal after extending time to lodge the same. The reasons are contained on the face of the application and a supporting affidavit of Silvester Kinyua Mwamba sworn on 8.12.2023. The applicants aver that the trial magistrate was transferred to Bungoma from Nkubu Law Courts before the judgment was delivered. It is contended that though the date of delivery of the judgment was supposed to be on notice, despite inquiries and follow-up with the registry, it was only on 27.11.2023 that the applicants became aware of the delivery, yet it had been read from Bungoma Law Courts on 19.10.2023, without their knowledge or notification.
2. The applicants aver that after the court file was forwarded to Nkubu Law Courts by a letter dated 22.11.2023, they applied for the judgment and proceedings, after which they obtained a certificate of delay as per annexure marked SK II. The applicants aver the suit involved L.R No. Abogeta/U-Kiringa 517 and 304, which they had purchased from the administrator of the estate of Mutea M'Manyara as per H.C Succ. No. 266 of 1997. They aver the trial court invalidated the sale of the land to revert to the deceased estate. More so, is averred that the estate had been distributed when the applicants bought the land and that if the decree is executed, they stand to suffer for all mature blue gum trees, nappier grass and banana plants on the suit land, whose value is unascertainable and that the land may be alienated.



The applicants have attached copies of photographs for the developments on the land as annexures SK VI, a confirmed grant as SK V and a letter dated 22.11.2023 as SK 1. The applicants aver they are willing to deposit security, including the title deed as may be directed by the court.

3. In a replying affidavit sworn by Delfina Karoki Mutwiri on 18.12.2023, she opposed the motion for not filing an appeal on time; as premature for change of advocates without courts leave; as inordinately filed with no explanation given, as incompetence, untenable and for lack of substantiation of the alleged loss or damage. The respondent avers there are no good reasons why she should not enjoy the fruits of her judgment, as lawfully obtained on trust land fraudulently obtained by the applicants.
4. Section 79G of the *Civil Procedure Act* grants this court powers to entertain an appeal out of time, if the intended appellant has sufficient reasons or cause why the appeal was not filed within time. In exercising that discretion, the court has to consider the length of the delay, reasons or explanation for the delay, the prejudice to be occasioned to the opposite party, the public interest involved and the overall effect it will have in the administration of justice.
5. In *Leo Mutiso vs Rose Hellen Wangari Mwangi Civil Application No. Nai 255 of 1997*, the court said the power to grant or refuse an extension of time is discretionary, and a court must also consider the chances of the appeal succeeding. In *Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR*, the court said extenuating circumstances must exist for the court to exercise discretion in favor of the applicant. In *Nicholas Arap Salat & others v IEBC & others [2014] eKLR*, the court said that extension of time was not a matter of right to a party and must be considered on a case-to-case basis, after the applicant has laid the basis to the satisfaction of the court that the delay was reasonable and that there will be no prejudice to the opposite party. The court said the application must also be filed without unreasonable delay.
6. Regarding a stay pending appeal, a party must prove substantial loss, file the application without delay, and offer security for due realization of the decree should the appeal not succeed. Substantial loss is what has to be prevented from happening to preserve the substratum of the appeal. Tangible and cogent evidence must be laid bare by the applicant to substantiate it. See *James Wangalwa v Agnes Cheseto [2012] eKLR*, *RWW v EKW [2019] eKLR*, *Kenya Shell Ltd v Kibiru & another [1986] KLR 410*. The court has to balance the rights of the parties out to enjoy the fruits of its judgment against those of losing party who has an undoubted right of appeal.
7. Applying the preceding case law, the respondent has not denied the transfer of the presiding magistrate to Bungoma Law Courts and the attendant delay, miscommunication and notification of the date of the delivery of the judgment. The respondent has denied that the applicants were not privy to the date of the judgment delivery and or transmission of the judgment. The respondent has not blamed the applicants for the inordinate delay or said it has highly been prejudicial to her and or that it impedes the administration of justice.
8. As to the stay of execution, the applicants have laid bare the facts leading to the suit at the lower court and the present situation on the ground, which, if allowed to be disturbed, will create a situation that may be irreversible, were the applicants to succeed in the intended appeal.
9. In my considered view, the draft memorandum of appeal raises arguable points for consideration by this court. I find the application with merits. Leave is hereby granted for the memorandum of appeal to be filed within seven days from the date hereof. An order of stay of execution is hereby granted on condition that the applicants deposit the original title deeds with the court and Kshs.150,000/= as security for costs within 14 days from the date hereof; otherwise, the stay orders shall lapse. Costs to the respondent.



Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU  
ON THIS 13th DAY OF MARCH, 2024**

**In presence of**

**C.A Kananu**

**Miss Mugo for the respondent**

**Mageria for Murango Mwenda for the applicant**

**HON. C K NZILI**

**JUDGE**

